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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Brian S. Sharp,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-17-08133-PCT-DWL

ORDER

15 **INTRODUCTION**

16 Plaintiff Brian S. Sharp (“Sharp”) seeks review under 42 U.S.C. § 405(g) of the final
17 decision of the Acting Commissioner of Social Security (“Commissioner”), which denied
18 his application for disability benefits. For the following reasons, the Court finds that the
19 administrative law judge’s (“ALJ”) decision was based on reversible legal error and
20 remands for further proceedings.

21 Sharp is a 53-year-old man who previously worked as a repairer and construction
22 worker and alleges he became disabled in February 2013.¹ In April 2013, Sharp filed an
23 application for disability benefits. (A.R. 137-38.) The claim was denied on August 7, 2013
24 (A.R. 80-83), and again upon reconsideration on December 13, 2013 (A.R. 89-91). Sharp
25 then filed a written request for a hearing on January 24, 2014. (A.R. 92-93.) On June 23,
26 2015, Sharp appeared and testified at a video hearing at which an impartial vocational
27 expert also appeared and testified by telephone. (A.R. 43-62.) On September 8, 2015, the

28 ¹ In his application, Sharp initially alleged a disability onset date of January 1, 2011,
but he amended the onset date to February 24, 2013 at the hearing. (A.R. 46.)

1 ALJ issued a decision that Sharp was not disabled within the meaning of the Social Security
2 Act. (A.R. 26-38.) The ALJ's decision became the Commissioner's final decision when
3 the Appeals Council denied Sharp's request for review on March 17, 2017. (A.R. 8-14.)

4 **LEGAL STANDARD**

5 The Court addresses only the issues raised by the claimant in the appeal from the
6 ALJ's decision. *Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). "The ALJ is
7 responsible for determining credibility, resolving conflicts in medical testimony, and
8 resolving ambiguities." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), *as*
9 *amended on reh'g* (Aug. 9, 2001). The Court should uphold the ALJ's decision "unless it
10 contains legal error or is not supported by substantial evidence." *Orn v. Astrue*, 495 F.3d
11 625, 630 (9th Cir. 2007). "Substantial evidence is more than a mere scintilla but less than
12 a preponderance." *Id.* Put another way, "[i]t is such relevant evidence as a reasonable
13 mind might accept as adequate to support a conclusion." *Id.* (citation omitted). The Court
14 should uphold the ALJ's decision "[w]here evidence is susceptible to more than one
15 rational interpretation," but the Court "must consider the entire record as a whole and may
16 not affirm simply by isolating a specific quantum of supporting evidence." *Id.* (citations
17 and internal quotation marks omitted).

18 "[H]armless error principles apply in the Social Security Act context." *Molina v.*
19 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). "[A]n ALJ's error is harmless where it is
20 inconsequential to the ultimate nondisability determination." *Id.* (citations and internal
21 quotation marks omitted). The Court must "look at the record as a whole to determine
22 whether the error alters the outcome of the case." *Id.* Importantly, however, the Court may
23 not uphold an ALJ's decision on a ground not actually relied on by the ALJ. *Id.* at 1121.

24 To determine whether a claimant is disabled for purposes of the Social Security Act,
25 the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the
26 burden of proof on the first four steps, and the burden shifts to the Commissioner at step
27 five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ
28 determines whether the claimant is engaging in substantial gainful activity. 20 C.F.R.

1 § 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.* At step
2 two, the ALJ determines whether the claimant has a “severe” medically determinable
3 physical or mental impairment. *Id.* § 404.1520(a)(4)(ii). If not, the claimant is not disabled
4 and the inquiry ends. *Id.* At step three, the ALJ considers whether the claimant’s
5 impairment or combination of impairments meets or medically equals an impairment listed
6 in Appendix 1 to Subpart P of 20 C.F.R. pt. 404. *Id.* § 404.1520(a)(4)(iii). If so, the
7 claimant is automatically found to be disabled. *Id.* If not, the ALJ proceeds to step four.
8 At step four, the ALJ assesses the claimant’s residual functional capacity (“RFC”) and
9 determines whether the claimant is capable of performing past relevant work. *Id.*
10 § 404.1520(a)(4)(iv). If so, the claimant is not disabled and the inquiry ends. *Id.* If not,
11 the ALJ proceeds to the fifth and final step, where he determines whether the claimant can
12 perform any other work based on the claimant’s RFC, age, education, and work experience.
13 *Id.* § 404.1520(a)(4)(v). If so, the claimant is not disabled. *Id.* If not, the claimant is
14 disabled.

15 BACKGROUND

16 At step one, the ALJ found Sharp met the insured status requirements of the Social
17 Security Act through March 31, 2016 and had not engaged in substantial gainful activity
18 since January 1, 2011, the alleged onset date.² (A.R. 31.) At step two, the ALJ found that
19 Sharp had the following severe impairments: diabetes and degenerative disc disease (DDD)
20 of the back. (A.R. 31.) The ALJ also found that Sharp had the following non-severe
21 impairments: coronary artery disease and obesity. (A.R. 31-32.) At step three, the ALJ
22 determined that Sharp did not have an impairment or combination of impairments that
23 meets or medically equals the severity of a listed impairment. (A.R. 32.) At step four, the
24 ALJ found that Sharp had the residual functional capacity to perform medium work with
25 the following limitations: limited to occasional exposure to heights, moving machinery,
26 and temperature extremes. (A.R. 32-36.) The ALJ further found that Sharp was unable to

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28 ² It is not clear why the ALJ used the alleged onset date of January 1, 2011 given that
the ALJ noted in her opinion that Sharp amended the alleged onset date to February 24,
2013 at the hearing. (A.R. 29.)

1 perform any past relevant work. (A.R. 36.) At step five, the ALJ found that, considering
2 Sharp's age, education, work experience, and residual functional capacity, there are jobs
3 that exist in significant numbers in the national economy that Sharp can perform, including
4 hand packager, order filler, and dishwasher/janitor. (A.R. 37-38.)

5 Sharp argues that the ALJ's decision is defective for three reasons: (1) the ALJ erred
6 at step two in failing to consider Sharp's attacks of cardiac arrhythmia; (2) the ALJ erred
7 at step four in rejecting Sharp's symptom testimony; and (3) the ALJ erred at step four in
8 determining Sharp's RFC without reference to nonexertional limitations from Sharp's
9 cardiac arrhythmia. (Doc. 13.)

10 As explained below, the Court agrees the ALJ committed reversible error during
11 step four.

12 I. Whether the ALJ Erred at Step Two in Failing to Consider Sharp's Attacks of
13 Cardiac Arrhythmia

14 Sharp argues that the ALJ erred in failing to consider his attacks of cardiac arrhythmia
15 at step two. (Doc. 13 at 1, 11.)

16 At step two, the ALJ considers whether the claimant has a "severe" impairment, 20
17 C.F.R. § 404.1520(a)(4)(ii), defined as "any impairment or combination of impairments
18 which significantly limits [the claimant's] physical or mental ability to do basic work
19 activities," *id.* § 404.1520(c). "An impairment or combination of impairments can be found
20 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a
21 minimal effect on an individuals [sic] ability to work.'" *Smolen v. Chater*, 80 F.3d 1273,
22 1290 (9th Cir. 1996) (citation omitted).

23 Sharp testified at the hearing that his atrial fibrillation (or atrial arrhythmia) is the
24 main condition that keeps him from working. (A.R. 51.) Yet the ALJ did not even consider
25 atrial fibrillation at step two. The only cardiac condition the ALJ addressed was coronary
26 artery disease (A.R. 31), which is an entirely different condition.

27 Ninth Circuit law is not a model of clarity concerning how to evaluate claims of
28 step-two error. Some cases suggest that, although it is error for an ALJ to fail to
characterize a particular impairment as "severe" during step two, the error can be

1 disregarded as harmless if the ALJ properly addresses the impairment during later steps.
2 *See, e.g., Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (“Even assuming that the ALJ
3 erred in neglecting to list the bursitis at Step 2, any error was harmless. . . . The decision
4 reflects that the ALJ considered any limitations posed by the bursitis at Step 4. As such,
5 any error that the ALJ made in failing to include the bursitis at Step 2 was harmless.”);
6 *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (“[T]he ALJ did not find that Burch’s
7 obesity was a ‘severe’ impairment Assuming without deciding that this omission
8 constituted legal error, it could only have prejudiced Burch in step three (listing impairment
9 determination) or step five (RFC) because the other steps, including this one, were resolved
10 in her favor.”). Other decisions suggest that a claimant can’t complain about an ALJ’s
11 failure to identify a particular impairment as “severe” during step two so long as the ALJ
12 determined the claimant also had other impairments that so qualify. *See Buck v. Berryhill*,
13 869 F.3d 1040, 1048-49 (9th Cir. 2017) (citation omitted) (“Buck misunderstands the
14 purpose of step two in the analysis. Step two is merely a threshold determination meant to
15 screen out weak claims. It is not meant to identify the impairments that should be taken
16 into account when determining the RFC. . . . Moreover, step two was decided in Buck’s
17 favor after both hearings. He could not possibly have been prejudiced.”).

18 Given these difficult-to-reconcile precedents, the Court declines to definitively
19 resolve whether the ALJ “erred” during step two by failing to characterize Sharp’s atrial
20 fibrillation/arrhythmia as a severe impairment. The dispositive issue in this case is whether
21 the ALJ properly evaluated the evidence and testimony concerning that condition during
22 later steps and factored that condition into the RFC.

23 II. Whether the ALJ Erred at Step Four in Rejecting Sharp’s Symptom Testimony

24 A. **Legal Standard**

25 “In assessing the credibility of a claimant’s testimony regarding subjective pain or
26 the intensity of symptoms, the ALJ engages in a two-step analysis.” *Molina*, 674 F.3d at
27 1112. “First, the ALJ must determine whether there is objective medical evidence of an
28 underlying impairment which could reasonably be expected to produce the pain or other

1 symptoms alleged.” *Id.* (citations and internal quotation marks omitted). The ALJ found
2 that Sharp had satisfied this first step. (A.R. 34 [“[T]he undersigned finds that the
3 claimant’s medically determinable impairments could reasonably be expected to cause the
4 alleged symptoms”].)

5 If the first step is satisfied, and “there is no evidence of malingering, then the ALJ
6 must give specific, clear and convincing reasons in order to reject the claimant’s testimony
7 about the severity of the symptoms.” *Molina*, 674 F.3d at 1112 (citations and internal
8 quotation marks omitted). Such testimony can’t be rejected simply because it can’t be
9 verified by objective medical evidence. 20 C.F.R. § 404.1529(c)(2) (“[W]e will not reject
10 your statements about the intensity and persistence of your pain or other symptoms or about
11 the effect your symptoms have on your ability to work solely because the available
12 objective medical evidence does not substantiate your statements.”). Here, the ALJ did not
13 find there was evidence of malingering, so she was required to provide “specific, clear and
14 convincing reasons” to reject Sharp’s testimony.

15 “A finding that a claimant’s testimony is not credible must be sufficiently specific
16 to allow a reviewing court to conclude the adjudicator rejected the claimant’s testimony on
17 permissible grounds and did not arbitrarily discredit a claimant’s testimony regarding
18 pain.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (citation and quotation
19 marks omitted). “General findings are insufficient; rather, the ALJ must identify what
20 testimony is not credible and what evidence undermines the claimant’s complaints.”
21 *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (citation omitted); *see also Holohan*
22 *v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001) (“[T]he ALJ must specifically identify
23 the testimony she or he finds not to be credible and must explain what evidence undermines
24 the testimony.”). “[P]roviding a summary of medical evidence in support of a residual
25 functional capacity finding is not the same as providing clear and convincing *reasons* for
26 finding the claimant’s symptom testimony not credible.” *Brown-Hunter*, 806 F.3d at 494.
27 Additionally, the ALJ must “elaborate on *which* daily activities conflicted with *which* part
28 of Claimant’s testimony.” *Burrell*, 775 F.3d at 1138.

1 **B. Sharp's Testimony**

2 Sharp testified that his atrial fibrillation is the main reason he is unable to work full
3 time. (A.R. 51.) He testified that when he goes into atrial fibrillation, he has chest pains
4 and difficulty breathing and his pulse goes "sky high." (*Id.*) He also has headaches as a
5 result of the atrial fibrillation. (A.R. 55-56.) He claims that he has been going into atrial
6 fibrillation two or three times a week, on average, since February 2013. (A.R. 51-52.)
7 When the atrial fibrillation comes, he says it lasts for thirty minutes to three hours. (A.R.
8 52.) During episodes of atrial fibrillation, he has to stop moving entirely—he cannot work
9 through it. (A.R. 52, 58.) He does not know what causes it to start at any given time. (A.R.
10 52.) He had an ablation procedure, but he testified it did not help with the condition. (A.R.
11 53.)

12 Sharp testified that he also gets headaches that are not related to his atrial fibrillation.
13 (A.R. 56.) When he has headaches, he feels "major pains that radiate from the back of
14 [his] neck all the way up into [his] temples." (A.R. 56.) He has to lie down and use his
15 oxygen and normally cannot work through them. (A.R. 56, 58.)

16 Sharp also testified that "[b]oth [his] shoulders hurt real bad all the time." (A.R.
17 51.) He had a left shoulder replacement in 2014, and he testified that the pain had resolved
18 somewhat initially, but it still aches now. (A.R. 54.) He testified that he could not lift 30
19 to 40 pounds repeatedly throughout the day. (A.R. 54.)

20 The ALJ noted the testimony summarized above as well as information Sharp
21 provided about these conditions, his diabetic neuropathy, and his degenerative disc disease
22 in his Exertional Daily Activities Questionnaire (A.R. 160-62) and Function Report (A.R.
23 171-79).

24 The ALJ then found that Sharp's "statements concerning the intensity, persistence
25 and limiting effects of [his] symptoms [were] not entirely credible." (A.R. 35.)³ Following

26 ³ The Court notes that the ALJ's use of the phrase "not entirely credible" provides no
27 information about the weight the ALJ actually afforded the testimony. But given that the
28 RFC does not contain the limitations to which Sharp testified, the Court will assume the
ALJ gave no weight to Sharp's testimony. *See Parker v. Astrue*, 597 F.3d 920, 922 (7th
Cir. 2010), *as amended on reh'g in part* (May 12, 2010) (noting that "[t]he statement by a
trier of fact that a witness's testimony is 'not *entirely* credible' yields no clue to what weight

1 that statement, the ALJ summarized the objective medical evidence and the medical
2 opinions in the record and provided four reasons in support of her RFC finding: (1) Sharp's
3 "fairly active daily activities" support the RFC; (2) he received "conservative treatment";
4 (3) "his impairments are stable"; and (4) there is a "relative lack of any recent treatment of
5 import without requiring recent hospitalizations." (A.R. 34-36.)

6 C. Analysis

7 Here, as in *Brown-Hunter*, the ALJ erred in "fail[ing] to identify the testimony she
8 found not credible," and, as such, could "not link that testimony to the particular parts of
9 the record supporting her non-credibility determination." 806 F.3d at 494. Consequently,
10 the Court "cannot review whether the ALJ provided specific, clear, and convincing reasons
11 for rejecting [the] pain testimony." *Id.*; see also *Burrell*, 775 F.3d at 1139 (noting that ALJ
12 erred in "not mak[ing] a specific finding linking a lack of medical records to Claimant's
13 testimony about the intensity of her back, neck, and head pain"). After making her
14 boilerplate statement that Sharp's statements "not entirely credible" (A.R. 34), the ALJ
15 merely summarized the medical record and the findings of the independent medical
16 examiners. "[P]roviding a summary of medical evidence in support of a residual functional
17 capacity finding is not the same as providing clear and convincing reasons for finding the
18 claimant's symptom testimony not credible." *Brown-Hunter*, 806 F.3d at 494.

19 Furthermore, although the ALJ provided four reasons in support of her RFC finding,
20 this is not the same as "identify[ing] what testimony is not credible and what evidence
21 undermines the claimant's complaints." *Burrell*, 775 F.3d at 1138 (citation omitted). And
22 even assuming these were also reasons why the ALJ rejected Sharp's testimony, they
23 cannot be upheld as clear and convincing.

24 With respect to Sharp's daily activities, the ALJ erred in "not elaborat[ing] on *which*
25 daily activities conflicted with *which* part of Claimant's testimony," *id.* at 1138, and, thus,
26 the Court cannot evaluate whether this reason was convincing. Moreover, it is not clear
27 why any of the cited activities are necessarily inconsistent with an inability to work due to
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the trier of fact gave the testimony," rendering it "meaningless boilerplate").

1 unpredictable episodes of atrial fibrillation.

2 The ALJ also mentioned “conservative treatment,” yet she acknowledged that Sharp
3 underwent an ablation procedure to address his atrial fibrillation (which didn’t work).
4 (A.R. 35.) The ALJ didn’t attempt to explain why she viewed this particular procedure as
5 conservative and didn’t identify other courses of treatment that Sharp should have pursued.
6 Moreover, Sharp identifies evidence in his brief suggesting his course of treatment was, if
7 anything, aggressive. (Doc. 13 at 5-6, citing A.R. 378, 442, 535-36 [Sharp was placed on
8 Warfarin during one hospitalization episode related to his heart condition, “underwent
9 cardioversion with injection of Adenocard (adenosine), a drug used to . . . restor[e] normal
10 sinus rhythm,” during a different hospitalization episode, and “underwent radiofrequency
11 ablation” during a separate doctor visit].)

12 Next, the ALJ noted that Sharp’s impairments were stable, but again, it is not clear
13 which impairments the ALJ was addressing or how this purported stability necessarily
14 conflicted with Sharp’s testimony. *See Petty v. Astrue*, 550 F. Supp. 2d 1089, 1099 (D.
15 Ariz. 2008) (“[A] condition can be stable but disabling.”); *Smith v. Astrue*, 2012 WL
16 5269395, *9 (D. Ariz. 2012) (“Although a treating physician indicated that Plaintiff’s eye
17 condition was ‘stable’ and no further treatment was recommended . . . , this . . . does not
18 make Plaintiff’s eye condition less of an impairment . . .”).

19 Finally, the Court cannot even discern the meaning of the ALJ’s last proffered
20 reason—the “relative lack of any recent treatment of import without requiring recent
21 hospitalizations”—and, thus, concludes that it doesn’t qualify as a clear and convincing
22 reason for rejecting Sharp’s testimony.

23 Accordingly, the Court finds that the ALJ did not provide sufficiently specific
24 reasons for rejecting Sharp’s testimony. Moreover, even if the Court infers that the reasons
25 the ALJ provided in support of her RFC finding were also her reasons for rejecting Sharp’s
26 testimony, these reasons cannot be upheld as clear and convincing. This error was not
27 harmless, as Sharp testified that he has episodes of atrial fibrillation on average two or three
28 times a week, lasting for thirty minutes to three hours, during which he cannot work (A.R.

1 51-52), and the vocational expert testified that an individual who experienced
2 unpredictable, unscheduled breaks for thirty minutes to three hours due to impairments
3 could not sustain a job (A.R. 61).

4 III. Whether the ALJ Erred at Step Four When Determining Sharp's RFC

5 "[A]n ALJ must take into account a claimant's symptom testimony when
6 determining the RFC." *Revels v. Berryhill*, 874 F.3d 648, 666 (9th Cir. 2017). Here, the
7 ALJ failed to do so—the RFC did not account for Sharp's testimony that he experiences
8 frequent, disabling bouts of atrial fibrillation. This error was not harmless, for the reasons
9 stated above.

10 IV. Scope of Remand

11 "When the ALJ denies benefits and the court finds error, the court ordinarily must
12 remand to the agency for further proceedings before directing an award of benefits." *Leon*
13 *v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). This applies particularly "[i]f additional
14 proceedings can remedy defects in the original administrative proceeding." *Garrison v.*
15 *Colvin*, 759 F.3d 995, 1019 (9th Cir. 2014) (citation omitted). But there is an exception to
16 this rule, known as the "credit-as-true" rule, under which the court may remand with
17 instructions to calculate and award benefits. For this rule to apply, a three-part test must
18 be satisfied:

19 (1) the record has been fully developed and further administrative
20 proceedings would serve no useful purpose; (2) the ALJ has failed to provide
21 legally sufficient reasons for rejecting evidence, whether claimant testimony
22 or medical opinion; and (3) if the improperly discredited evidence were
credited as true, the ALJ would be required to find the claimant disabled on
remand.


23 *Id.* at 1020. Importantly, however, courts are required "to remand for further proceedings
24 when, even though all conditions of the credit-as-true rule are satisfied, an evaluation of
25 the record as a whole creates serious doubt that a claimant is, in fact, disabled." *Garrison*,
26 759 F.3d at 1021 (citing *Connett v. Barnhart*, 340 F.3d 871 (9th Cir. 2003)).

27 Here, the Court declines to remand for an award of benefits because further
28 administrative proceedings would arguably serve a useful purpose. Other than Sharp's

1 testimony, there is little evidence in the record indicating that Sharp's atrial fibrillation is
2 disabling. Furthermore, even if the credit-as-true rule were otherwise satisfied, the record
3 as a whole "creates serious doubt that [Sharp] is, in fact disabled." *Garrison*, 759 F.3d at
4 1021. Although various medical records note the existence of Sharp's atrial fibrillation,
5 no medical opinions in the record suggest Sharp is incapable of working—Dr. Nichols's
6 assessment only stated that Sharp wouldn't be able to "*perform lifting* during his episodes
7 of atrial fibrillation" (A.R. 333) (emphasis added), which is not the same thing as a medical
8 opinion that Sharp is disabled from performing any type of work.

9 Accordingly, **IT IS ORDERED** that the final decision of the Commissioner of
10 Social Security is **vacated**, and this case is **remanded** for further proceedings consistent
11 with this opinion. The Clerk shall enter judgment accordingly and **terminate** this case.

12 Dated this 5th day of March, 2019.

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17 Dominic W. Lanza
18 United States District Judge
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